SUPREME COURT, U. S.

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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1501

J. H. RUTTER REX MANUFACTURING COMPANY, INC.

Petitioner

versus

NATIONAL LABOR RELATIONS BOARD and AMALGAMATED CLOTHING WORKERS OF AMERICA, AFL-CIO

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MAY IT PLEASE THE COURT:

J. H. Rutter Rex Manufacturing Company, Inc., petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Fifth Circuit which enforced, in part, an order of the National Labor Relations Board.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, pages 1A-45A *infra*) is reported 473 F.2d 223, 82 LRRM 2264 (5th Cir. 1973). The Board's supplemental decision and order are reported at 194 NLRB No. 6 (1971) (Appendix D, pages 50A-73A *infra*).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment of the court of appeals was entered on February 7, 1973. (Appendix B, p. 46A *infra*). On March 12, 1973, the court of appeals denied a timely petition for rehearing *en banc* filed by J. H. Rutter Rex Manufacturing Company, Inc. (Appendix C, p. 49A, *infra*).

QUESTIONS PRESENTED FOR REVIEW

1. Whether, in the light of this Court's opinion in *NLRB v. J. H. Rutter Rex Manufacturing Co.*, 396 U.S. 258 (1969) (Appendix E, pages 74A-85A, *infra*) the court of appeals erred in enforcing the backpay order of the Board without mitigation on the basis of the Board's further delay in presenting the backpay claims.

2. Whether the court of appeals erred in extending the lawyer's work product exemption from discovery of *Hickman v. Taylor*, 329 U.S. 495 (1947) to create a new privilege applicable to the work product of non-lawyer Board personnel.

AUTHORITY AND STATUTES INVOLVED

This case involves interpretation of this Court's opinion in *NLRB v. J. H. Rutter Rex Manufacturing Co.*, 396 U.S. 258 (1969) and application of 29 U.S.C. §160(b) (National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §151 et seq) the pertinent provision of which states,

> "(b) . . . Any such [Board] proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United

States, adopted by the Supreme Court of the United States . . ." (Brackets added).

STATEMENT OF THE CASE

This case arises out of a strike which occurred at petitioner's New Orleans, Louisiana plant in April, 1954 and lasted one year. In 1956, the Board concluded that the strike was an unfair labor practice strike and ordered reinstatement of the strikers. *J. H. Rutter Rex Manufacturing Company, Inc.*, 115 NLRB 383 (1956). The Board's order was enforced by the Fifth Circuit on June 10, 1957. The Court stated that the numerous problems inherent in complying with the Board order should be resolved "in further administrative proceedings . . . or in direct contempt proceedings." *NLRB v. J. H. Rutter Rex Manufacturing Company, Inc.*, 245 F.2d 594, 598 (5th Cir. 1957).

Nearly four years later on November 4, 1961, the Board filed a backpay specification (referred to herein as the initial specification). Petitioner sought an injunction against the hearings on the initial specification due to the unreasonable delay of the Board in handling the case. Injunctive relief was denied. *NLRB v. J. H. Rutter Rex Manufacturing Co.*, 305 F.2d 242 (5th Cir. 1962). After hearings in 1962 and 1963, an initial backpay order was issued by the Board. [158 NLRB 1414 (1966)].

On review of the initial proceedings, the Fifth Circuit modified the initial backpay order by terminating petitioner's backpay liability as of July 30, 1959 because of the Board's inordinate delay in concluding the case. The court held that this cutoff reflected a proper balancing of the equities between all parties. *J. H. Rutter Rex Manufacturing Company, Inc. v. NLRB*, 399 F.2d 356 (5th Cir. 1968).

On writ of certiorari, this Court[1] reversed in an opinion expressly limited to ". . . the circumstances of this case." *NLRB v. J. H. Rutter Rex Manufacturing Co.*, 396 U.S. 258, 259 (1969). Chief Justice Burger and Justices Douglas and Harlan dissented, believing that the circuit court had properly approached the case as a problem in ". . . working out the equities of a back-pay order" and that the circuit court had ". . . arrived at its judgment as an exercise of its responsibility 'for assuring that the Board keeps within reasonable bounds' . . . in an area that necessarily involves 'diverse, complicated situations.'" (396 U.S. at p. 267-8) (p. 85A, *infra*).

The initial backpay specification did not consider any claims beyond June 26, 1961. The instant proceeding was initiated on November 30, 1970 by the filing of a supplemental backpay specification claiming additional backpay owed to thirty-three claimants for the period July 1, 1961 through May, 1963 with six claims extending beyond the latter date. This filing was more than 15 years after termination of the strike, more than 13 years after the 1957 enforcing opinion of the circuit court and more than nine years after the initial specification was filed.

During the 1971 hearings before the Board on the supplemental specification, petitioner contended that the additional Board delay between 1961 and 1970 should be taken into account in fashioning a supplemental backpay order. The Board's Trial Examiner rejected this argument stating that this Court's 1969 opinion had answered the argument adversely. (p. 68A, *infra*). The Board affirmed without comment, (p. 52A, *infra*). The circuit court held that ". . . the Board was correct in refusing to allow the

[1] At the time, the court was composed of the Chief Justice and seven Justices.

administrative delay to prejudice the claimants." (p. 6A, *infra*); and further, that to do so would be ". . . both unjust and inconsistent with the Supreme Court's decision . . ." (p. 8A, *infra*).

Also in connection with the hearing, petitioner obtained a subpoena duces tecum directed first to the Board's Regional Director (R21)[2] and later to the Board's General Counsel (R25) requiring production of notes and memoranda made by Board agents during interviews with the thirty-three claimants named in the supplemental backpay specification. These memoranda were prepared by non-lawyer compliance officers and were referred by them in the preparation of the backpay specification. The notes and memoranda included factual information bearing upon credibility of witnesses and relevant to the issues which had to be developed if petitioner was to defend itself against the gross amounts of backpay claimed.[3]

The comprehensive manner in which petitioner's request for documents was pressed is outlined in the footnote.[4]

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[2] This and all "R" references are to the joint appendix filed in the circuit court which document, consisting of two volumes, is being certified and transmitted to this Court as the record in accordance with Supreme Court Rule 21(2).

[3] The initial specification sought $342,000.00 but the ultimate liability imposed was $119,790.00. Thus, the inflation in the initial specification amounted to 64.7%. In the instant case, $54,551.00 was sought and $53,078.00 was awarded by the Board. (p. 57A, *infra*). Except for a single claim amounting to $9,592.00 which was remanded by the court of appeals, all awards, essentially unmitigated, were enforced. The remanded claim is not made a subject of this application.

[4] a) Subpoena duces tecum to Regional director dated February 5, 1971. (R21).
b) Subpoena duces tecum to counsel for General Counsel dated March 23, 1971 (R25).
c) Letter to General Counsel dated March 10, 1971 (R42).
d) Letter to counsel for the General Counsel dated March 10, 1971 (R54).
e) Oral requests, e.g. R232-243.
f) Motion to dismiss (R46; 859-875).
g) Exception, (R85).
Although the Trial Examiner ordered compliance with the subpoenas (R772-775) he was reversed by the Board on a special interim appeal. (R28;30). Letter requests were also denied. (R30)

The General Counsel refused to produce the notes and memoranda of the Board's lay personnel, claiming privilege, and the court of appeal ultimately agreed that the work product of the Board's lay personnel was protected in a trial proceeding by a "qualified privilege."

REASONS FOR GRANTING THE WRIT

POINT I

Although the Board and the court of appeals purported to consider the impact of the Board's further delay on the rights of the parties the decision of both is that this Court's 1969 opinion in *NLRB v. J. H. Rutter Rex Manufacturing Co.*, supra, foreclosed the issue.

Such construction of this Court's 1969 decision is erroneous and has resulted in the failure of the Board and the court to apportion the prejudicial effects of the delay between the parties. This Court limited its 1969 opinion to the circumstances then presented, to wit: the administrative delay preceding the filing of the initial backpay specification. This Court did not anticipate nor dispose of in advance the delay issue related to the supplemental backpay specification.

In its 1969 opinion, this Court cited *NLRB v. Electric Vacuum Cleaner Company, Inc.*, 315 U.S. 685 (1942), a case in which the Court refused *further to shorten* a backpay period which had already been shortened by the Board because of its administrative delay. See *Electric Vacuum Cleaner Company*, 18 NLRB 591, 636-637 (1939). *Electric Vacuum Cleaner* establishes the right of the Board to exclude a portion of the backpay period if the Board has unreasonably delayed the proceedings.

This Court's 1969 opinion dealt solely with the power of the reviewing court to modify a Board order — not with the power of the Board to consider its own delay in drafting its remedial order. The error of the Board lies in its belief that this Court's 1969 opinion precluded it from considering the further delay. The court of appeals erred in not requiring the Board to make findings on the delay issue and to consider the interests of the employer who was prejudiced by the delay. See *NLRB v. Brown*, 380 U.S. 278, 291-292 (1965).

POINT II

The effect of the court of appeals decision is to create a *new* evidentiary privilege precluding the production of factual material.[5] The court did not rely upon any judicially recognized privilege or statutory exemption from disclosure.

In its petition to quash the subpoena duces tecum (R23), the Board's General Counsel contended that the notes and memoranda of the Board's lay personnel which he refused to produce were the privileged "work product" of the Board's "agents" citing *Hickman v. Taylor* 329 U.S. 495, 67 S. Ct. 385 (1947), and in its brief to the court of appeals at page 16, the Board stated, ". . . the materials sought, which included notes and other memoranda made by Board agents in preparation of the case, are the 'work product' of such agents. *Hickman v. Taylor*. . . ."

In upholding this contention, the court of appeals has

[5] Whether or not a claimant looked for work during a given period, the names of employers and potential employers, dates of employment, dates of job applications, dollar amounts of interim earnings, if any, and reasons for lack of interim earnings, the information sought by the subpoenas, is hard factual information. The non-lawyer compliance officers questioned the claimants on these matters (R229-232; 244-249) and used the information elicited from them to prepare the supplemental specification. (See e.g. footnote 10 of the supplemental specification at R7).

improperly extended the "work product" exemption from discovery of *Hickman v. Taylor*, to a non-lawyer in a trial proceeding. *Hickman v. Taylor*, was decided on the basis of the public policy that a lawyer, in performing his duties to the court and to his client, must be able to work with a degree of privacy, free from unnecessary instrusion. (329 U.S. at p. 510). See *U.S. v. Proctor & Gamble Company*, 356 U.S. 677, 683 (1958). The Fifth Circuit has previously held that *Hickman v. Taylor*, does not extend to non-lawyers. *Southern Railway Company v. Lanham*, 403 F.2d 119 (5th Cir. 1968); *Southern Railway Company v. Campbell*, 309 F.2d 569 (5th Cir. 1962). Clearly, the same policy considerations do not prevail when the documents involved are those of a non-lawyer.

The court of appeals purported to qualify the privilege so that it might give way to disclosure in certain circumstances where a balancing of the interests of the litigants required it. (see p.21A and p.39A, *infra*). However, the court reasoned from an illogical premise. While it stated that the privilege might give way when the need for production outweighs the rationale for the privilege (p. 39A, *infra*) it also held, "Absent some showing of manifest injustice, the Board behavior must stand or fall on the existence *vel non* of that privilege and not on what this court perceives to be the fairest way for the Board to run its proceedings." (p. 11A, *infra*)

Furthermore, in qualifying the privilege, the court of appeal created a non-rule to be applied on an *ad hoc* basis depending upon ". . . who is investigating, what is being investigated, and the nature and content of the information sought to be discovered from the investigator." (p. 21A, *infra*) There is, therefore, no standard for the application

of this new privilege even if it can be considered "qualified" in view of the court's basic premise. (p. 11A, *infra*)

The problems created by the lower court's decision in its application in future cases can not be minimized by pretrial discovery. Although the Government, as a litigant, is generally considered subject to the rules of discovery, *U.S. v. Proctor & Gamble Company*, 356 U.S. 677, 681 (1958), there is no pretrial discovery in National Labor Relations Board proceedings. See *NLRB v. Interboro Contractors, Inc.*, 432 F. 2d 854 (2d Cir. 1970) (cert. den., 402 U.S. 915); see also, *Morgan Precision Parts v. NLRB*, 444 F. 2d 1210 (5th Cir. 1971).

The court of appeals opinion is also in direct conflict with the decision in *General Engineering Inc. v. NLRB*, 341 F.2d 367 (9th Cir. 1965) and with an earlier decision of the Fifth Circuit by a different panel in *NLRB v. Capitol Fish Company*, 294 F.2d 868 (5th Cir. 1961).

General Engineering was a backpay proceeding. Comparison of the subpoenas issued in the instant case to that issued in *General Engineering* and quoted at footnote 1 of 341 F.2d 367, reveal that the subpoenas sought identical information. Against a claim of privilege, the Ninth Circuit held that the subpoena duces tecum should not have been quashed by the Board.[6]

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[6] The Ninth Circuit described the privilege claimed in *General Engineering* as one claimed under Board Rule 102.118 (29 CFR §102.118), also relied upon in the instant case (R22), which rule insulates from disclosure all information which comes to a Board employee in the course of his official duties. This was the same type of privilege urged below in the instant case.

See also, *NLRB v. Seine and Line Fishermen's Union of San Pedro*, 374 F.2d 974 (9th Cir. 1967); *Florence Printing Company v. NLRB*, 376 F.2d 216, 223 (4th Cir. 1967); *Heinrich Motors, Inc. v. NLRB*, 403 F.2d 145, 150 (2nd Cir. 1968) where the Court held, "The law recognizes no general privilege between a discharged employee and a Board Compliance officer and the board has no power to create such a privilege."

The court of appeals erroneously distinguished *Capitol Fish* on the grounds that it did not involve the issue of privilege. (p. 8A, *infra*).[7] To the contrary, Judge Wisdom stated in *Capitol Fish*.

> "In the final analysis, justification for excluding government records rests on privilege." (294 F.2d at p. 874)

and,

> "It seems to us, however, that when a party has filed a request for evidence or testimony and the request can be denied only if the evidence or testimony is privileged, the question of privilege is as squarely raised by an unexplained refusal to reply as by an express claim of privilege and the court must decide the question." (294 F.2d at p. 975).

It is apparent that the identical issue was presented in the instant case but it was decided differently.

The effect of the court's decision on the ability of future respondents to defend themselves before the Board is likely to be substantial and harmful. This case represents not only a departure from the jurisprudence on the subject of privilege, but also a departure by the Board from the manner in which it customarily handles its cases by taking statements producible under the "Jencks Rule" embodied in the proviso to Board Rule 102.118, 29 CFR §102.118 (R236-242).

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[7] *Capitol Fish* involved a request that a Board attorney testify in a Board proceeding concerning an investigation which would have had an important bearing on the credibility of the witnesses who testified against the employer. (See 294 F.2d at p. 870-871). The Court held, "We hold that the investigating attorney's testimony was material, was not privileged, and was erroneously excluded . . ." (294 F.2d at p. 876).

Respondents before the Board are in a peculiar procedural position because of the lack of pretrial discovery coupled with the disadvantage of litigating in a proceeding in which the Board is investigator, accusor, prosecutor, judge and reviewing tribunal. (See *NLRB v. Capitol Fish Company*, 294 F.2d at p. 876). In backpay cases, the only tool of successful defense is frequently the claimant's statement used for purposes of cross examination.

To the end of depriving respondents of this defense tool and placing an intolerable defense burden upon them, it may be to the Board's interest to investigate cases without any documention producible under its rules. Thus, the probable effect of this decision, if allowed to stand, will be to encourage general non-disclosure rather than merely to serve a legitimate need of reasonable privacy in the fulfillment of the Board's statutory duties."

Curbing this attitude on the part of Board agents will promote fairness in Board proceedings and compliance with the statutory mandate that such proceedings be conducted, so far as practicable, in accordance with the rules of evidence and procedure applicable in the district courts. (29 U.S.C. §160(b)).

Reversal of this decision will not impair the Board function because prior to this case the Board customarily collected formal statements from claimants. It has been held that "No special characteristics of an administrative

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[9] In this regard, 5 U.S.C. §552 (b) (5) and (7) afford protection to the Board against disclosure of certain investigative and law enforcement files but not with respect to information which is "available by law to a party" as determined by reference to discovery practices regulated by the courts. Cf. *Tennessean Newspapers, Inc. v. Federal Housing Admin.*, 464 F.2d 657 (6th Cir. 1972); *G.S.A. v. Benson*, 415 F.2d 878 (9th Cir. 1969); *Consumers Union of U.S. v. Veterans Admin.*, 301 F.Supp. 796 (S.D.N.Y. 1969); See also, *Getman v. NLRB*, 450 F.2d 670 (D.C. Cir. 1971).

hearing justify the exclusion of evidence which it would be error to exclude in a court trial. . . ." *NLRB v. Capitol Fish Company*, supra (294 F.2d at p. 872); furthermore, this Court has enjoined the circuit courts to assure that the Board keeps within "reasonable bounds". *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951); see *NLRB v. Brown*, 380 U.S. 278 (1965).

The departure of the Board in this case from its customary procedures prompted the Trial Examiner to state,

> "The reason for the Jencks rule, in the opinion of the Trial Examiner, is to keep the Government servants honest and to bring about the circumstance in which no citizen or person may be found guilty of a statutory offense, when the government has in its possession [sic] which would indicate that citizen or person not guilty of such an offense. It, no doubt, shocks our sense of fair play where the government may have evidence to prove that an individual is not guilty of an offense and withholds that and the individual is found guilty of the offense. I think the intent of all rules of this character must be circumscribed by the fact that no person be ever found guilty of any statutory offense where the government had possession of facts and evidence and testimony and documents which would indicate that that person was not guilty of the offense." (R773-774)

The court of appeals holding is unauthorized by statute and is in conflict with prior decisions of the Fifth and Ninth Circuits. Furthermore, the newly created privilege is so substantial a departure from the accepted and usual rules of conduct for judicial proceedings, applicable to Board proceedings, as to call for an exercise of this Court's

power of supervision in an important area of federal labor law not heretofore settled by this Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE

It is certified that three copies of the foregoing petition for a writ of certiorari have been served by mail, by depositing same in a United States mail box, first class airmail postage prepaid, addressed as follows:

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